Supreme Court, U.S.
FILED

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

ROSARIA D'AMBROSIO,
Petitioner

v.

SHOPPERS FOOD WAREHOUSE, VA CORP.,
D/B/A Shoppers Food Warehouse,
Respondent

Petition for a Writ of Certiorari to the
Supreme Court of the Commonwealth of Virginia

PETITION FOR A WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

In this tort action the trial court granted a Judgement Notwithstanding The Verdict to the Defendant and vacated a jury award to the Plaintif of $60,000. The following questions are presented in this petition:

(1) Whether the granting of the Defendant's Motion For Judgement Notwithstanding The Verdict violates the Petitioner's constitutionally protected right of trial by jury and to have no fact tried by jury be otherwise reexamined in any Court of the United States, than according to the rules of common law, as set out in the Seventh Amendment.

(2) Whether the granting of the Defendant's Motion For Judgement Notwithstanding The Verdict violated the Petitioner's constitutionally protected right to due process under the Fourteenth Amendment.

(3) Whether the trial court's application of Virginia law is such a departure from any acceptable standard of review that the Plaintiff's right to a jury trial or due process under (1) or (2), above, is a separate deprivation of constitutional rights.

PARTIES AND RULE 29.6 STATEMENT

All of the parties who participated below are set out in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Rosaria D'Ambrosio respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is attached in the Appendix.

JURISDICTION

The Supreme Court of Virginia rendered its decision on July 30, 1996, a timely Petition For Rehearing was denied on September 13, 1996. This court's jurisdiction is involved under 28 USC § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, § 2 [1] of the U.S. Constitution states:

> **"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."**

The Seventh Amendment of the United States Constitution States:

> **"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."**

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> **"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."**

STATEMENT OF THE CASE

A. The Proceedings Below.

This tort action was to recover damages for injuries incurred by the plaintiff when she tripped and fell in the defendant's grocery store.

The plaintiff adduced evidence that, as she walked into the defendant's store with her mother she noted the defendant's employee taking produce from full produce boxes stacked on a cart in the store aisle.

The plaintiff avoided that area and began looking at produce in a center aisle island display case. After walking around the island display case she turned to retrace her steps, tripping over a full box of produce apparently placed directly behind her by the store employee. The produce was in the sam sort of box from which the employee had been working and when he saw the plaintiff trip and fall he immediately began apologizing for the box having been placed behind the plaintiff and picked up the box and began clearing the mess left on the floor from the full box of produce that was scattered when the plaintiff tripped over it. The defendant adduced no evidence,

but argued that, as a matter of law in Virginia the plaintiff was contributorily negligent because the box was in plain view. Thus the plaintiff could, under Virginia law, recover nothing.

At the close of the plaintiff's case, the defendant made a Motion To Strike which was taken under advisement by the Court. The defendant then rested without adding any evidence and renewed its Motion To Strike which was also taken under advisement by the Court. The jury was then instructed by the Court, the Plaintiff and the Defendant made closing arguments and the matter was presented to the jury which returned a verdict for the Plaintiff in the amount of $60,000. The jury was discharged and the defendant moved for judgement notwithstanding the verdict.

The Court then granted the Defendant's Motion To Strike and Motion for Judgement Notwithstanding The Verdict by order entered February 14, 1996.

The Plaintiff filed a timely Notice of Appeal and filed a timely Petition For Appeal with the Supreme Court of Virginia, which was timely responded to by the Defendant's Brief In Opposition To Petition For Appeal. After hearing oral argument from the Plaintiff, the Supreme Court of Virginia refused the Petition For Appeal by order of July 30, 1996. The Plaintiff filed a timely Petition For Rehearing which was denied on September 13, 1996.

REASONS FOR GRANTING THE PETITION

I. THE TRIAL COURT'S GRANTING OF THE DEFENDANT'S MOTION FOR JUDGEMENT NOTWITHSTANDING THE VERDICT DISREGARDED ITS OWN STATE'S STANDARD OF REVIEW AND EFFECTIVELY DEPRIVED THE PLAINTIFF OF HER DUE PROCESS RIGHTS AND FURTHER, HER CONSTITUTIONAL RIGHTS GUARANTEED UNDER

ARTICLE IV § 2 AND THE SEVENTH AMENDMENT TO THE U.S. CONSTITUTION.

In the past, this Court has uniformly held that the 14th Amendment right to due process does not apply to states in civil matters so as to grant Seventh Amendment guarantees to a right to a jury trial in state courts. It is Appellate's position that it time for this Court to break from its past rulings and apply the Seventh Amendment, the Fourteenth Amendment and Article IV § 2 in conjunction in such a way as to allow every state's citizens the same right to a jury trial, whether the matter be criminal or civil. To hold otherwise is not now, nor has it ever been logically consistent. To hold otherwise is not now, nor has it ever been consistent with the clear intent of the framers of the Constitution to make access to court redress uniform throughout the many states.

If this Court were to so rule, and thus require each state to follow federal guidelines to the Defendant's Motion For Judgement Notwithstanding The Verdict, Appellant would retain her jury verdict as justice requires.

Failing that radical departure, Appellant here argues that, even if the 14th Amendment's due process clause is not applied to the states so as to require state uniformity in granting jury trials, it still ought to be applied to require states' uniformity in setting standards as to how and when a rendered jury verdict may be set aside. Failing that, it still ought to be applied so as to require a state to at least adhere to its own standards in determining when a court may tamper with a rendered verdict.

To set it out plainly, appellant is here asking the Court to tell the states that all must grant jury trials in civil cases in a way that complies with the Seventh Amendment.

If this Court is unwilling to go that far, appellant asks merely that this court tell the states that: once you have given someone a right to a jury trial, you must then follow Article IV, and the Seventh and Fourteenth Amendments in determining how and when you can snatch from the plaintiff her verdict.

If this Court is yet unwilling to go that far, appellant asks that this Court tell each state that :

> **If you have given a person a jury trial and you have set out standards for when a jury verdict may be not only set aside, but further, judgement be granted in contravention of that verdict, you must at least follow Article IV, the Seventh and Fourteenth Amendments' and comply with your own stated standards.**

The Fourteenth Amendment has been applied in a straightforward manner in various cases to advance the Article IV Privileges and Immunities Clause.

It is logically absurdity to suggest that the privileges and immunities clause of Article IV relates, vis a vis jury trials, only to criminal trials.

Article IV § 2 gives each U.S. citizen the same constitutional privileges and immunities irrespective of their state of residence.

The Fourteenth Amendment makes clear that U.S. citizenship is paramount and dominates state citizenship with regard to each individual's privileges and immunities. See 16a Am Jur 2 § 716 and § 717.

To allow each state to have, or more pertinently to apply, different sets of standards to determine when a judge may snatch a jury verdict from a Plaintiff makes a mockery of what should be at least a uniform standard of conduct for r a jury trial, once granted.

There is precedent for the application of the Seventh Amendment to the standards that apply to the conduct of a jury trial even where no right to jury trial exists. It has been held that review of a verdict where a jury trial was not a matter of right bur was granted with the consent of the parties, the test of the sufficiency of evidence is the same as the one applicable of the jury trial had been a matter of right. See 47 Am Jur 2d, Jury § 11, citing to Security Mut. Casualty co. v. Affiliated FM Ins. Co. (CA 8 Minn) 471 F2d 238.

The importance of the right to a jury trial ought to be sufficient to compel this court to give its sanction to a uniform right to jury trials within the several states. See 15 The Papers of Thomas Jefferson, 267 (Boyd ed., 1958); and the Rehnquist dissent in Parklane Housing Co. v. Shore, 439 U.S. 322 (1979).

But this Court need not go that far to advance justice in this case. The sanctity of jury verdicts, separate and apart from the threshold right to jury trial initially, is within the preview of Article IV, the Seventh and Fourteenth Amendments. The standard for determining when a Federal Court trial judge may grant a judgement notwithstanding a verdict is clear (and was clearly not followed and is apparently not the law in Virginia.)

The trial court should not, under the Seventh Amendment, tamper with a rendered verdict and grant a judgement notwithstanding the verdict unless the jury has clearly committed error. See 47 Am Jur 2d, Jury § 17, citing to Presidential Properties Inc. v. Canto, (CA 5 Fla) 615 F2d 657.

The Court is not to usurp the function of the jury by taking cases from the jury where the evidence is conflicting or where different

conclusions could be drawn from the undisputed facts. See 47 Am Jur 2d, Jury § 15 citing to Woodward v. Atlantic C.L.R., (CA 5 Fla) 57 F2d 1019.

This Court has shown its high regard for the sanctity of jury trials, once granted, by setting a clear and high standard for any review of a jury's factual findings in holding that:

> "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all Justifiable inferences are to be drawn in his favor."

See Anderson v. Liberty Lobby, Inc., 477 U.S.242, 255 (1986). It is essential for any U.S. court, whether state or Federal, in reviewing a jury verdict to abide by these guidelines. Otherwise, the province of the jury is invaded, resulting in a violation for the Seventh Amendment.

It might be argued that the sort of Federal oversight of state court rulings advocated here is an unnecessary intrusion into the states' judicial independence.

That argument can be met with a rule that applies the common law rule that was in existence at the time the Seventh Amendment was drafted, to wit, that if a trial judge determines an insufficiency of evidence or sufficient proof of a legal defense to require the setting aside of a jury verdict, his authority is limited to the granting of a new trial absent a showing of both no evidence and insufficient pleading. See National Car Rent.

Sys., Inc. v. Better Monkey Grip Co., 511 F2d 724; Roger v. City of Fort Worth, 275 SW 214 (1925); Dudley v. Harrison McCready and Co., 173 So 825 (1937); and De Ramirez v. Sovereign Camp W.O.W., 123 SW2d 737.

See also Dorsey v. Barba, 240 P2d 604 (1952) which held, in part, that:

> ". . . it is not the mere form of a jury trial to which one is entitled under the Constitution, but the fundamental right to have a jury determination of a question of fact. It is of course, clear that there has been no denial of such right if a verdict is set aside and motion for new trial granted." (emphasis mine) p.609.

This compromise rule being advocated here is one that is already being applied in many states. It has the logical beauty of allowing states to retain complete control over when and how to allow a jury verdict to stand while simultaneously preserving for each U.S. citizen his absolute Constitutional guarantee of final jury determination of fact issues. See Schmitz v. Yant, 409 P2d 346, at p. 350 where the court states:

> "It should be made clear that as between the conflicting principals of allowing the trial judge wide discretion in granting new trials and of protecting the jury system as an effective method of deciding disputed this court believes the latter to be of the greater consequence."

See also Rogers v. City of Fort Worth, 275 SW 214.

The application of the rule here suggested would have no effect on state statutes or case

law that has held there to be no constitutional violation in the gravity of a motion for judgment notwithstanding the verdict in accordance with uncontradicted evidence or where there is no evidence to support the jury verdict, or where under leave reserved with jury's assent to render such a verdict. See 50 C.J.S. Juries § 128(d) and the line of cases cited there. See also The Fourteenth Amendment, William J. Brennan, Jr., Trial, December 1989, p. 26, where he states:

> "When Congress decided to rely on the federal judiciary to define and enforce the guarantees of the fourteenth amendment, it was in effect conceding the peculiar competence of that branch of government to perform such tasks. The legislative, executive, or other arm of government alleged to have encroached on or threatened to trammel rights may be compelled by courts to make amends or to refrain from acting. Without some such means of vindication, legal rights are likely to become little more than moral claims, readily ignored when the forces of government find it convenient to do so."

In a very real sense the right to an unimpeded jury trial in a civil case is an issue that goes to the gravamen of the fourteenth amendment, i.e. providing to all U.S. citizens freedom and equality before the courts. To erode the sanctity of a jury trial, even in a civil case erodes individual freedom. Such an erosion has no legitimate purpose. To guard against such an erosion is why Article IV, the seventh and fourteenth amendments where promulgated. See 47 Am Jur, Jury, § 2 where it states:

"The purpose for a jury is to guard against the excesses of arbitrary power, to make available the common sense judgment of the community in preference to the professional or perhaps overconditioned or biased response of a judge".

See also Gray v. Southern Pac. Co., 145 P2d 561, which reiterates the strict federal rule with regard to setting aside a jury verdict.

In the instant case it is clear that:

1. The pleadings were sufficient;

2. The plaintiff adduced significant evidence in support of the jury verdict; and

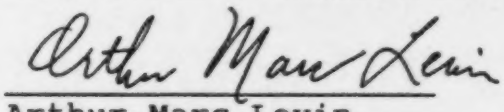
3. There was no real evidence of the plaintiff's contributory negligence. All of the above issues were effectively raised at trial and in the appellate pleadings. See the trial transcript and Appellate Brief attached in pertinent part of the appendix.

It is also clear that the rule of law as applied in this case effectively denied the plaintiff her constitutionally guaranteed right to a jury trial.

CONCLUSION

For the above reasons a Writ of Certiori should be granted to review the judgment and opinion of the Supreme Court of Virginia.

Respectfully submitted,



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Appendix A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 13th day of September, 1996.

Rosaria D'Ambrosio,
Appellant,

against Record No. 961020
Circuit Court No. L-137087

Shoppers Food Warehouse, etc.,
Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 30th day of July, 1996 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

s/David B. Beach

Clerk

Appendix B

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 30th day of July, 1996.

Rosaria D'Ambrosio,
Appellant,

against Record No. 961020
Circuit Court No. L-137087

Shoppers Food Warehouse, etc.,
Appellee.

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By: s/ (illegible)

Deputy Clerk

APPENDIX C

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

No.

ROSARIA D'AMBROSIO,

Appellant, At Law No. 137087
v. (formerly At Law No. 125882)

SHOPPERS FOOD WAREHOUSE, VA CORP.
D/B/A Shoppers Food Warehouse,

Appellee.

PETITION FOR APPEAL

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2. The Trial Court erred in granting defendant's Motion to Strike and Motion for Judgment Notwithstanding the Verdict because, "under the case law of Virginia, the plaintiff was contributorily negligent as a matter of law," in that, based on the evidence presented, plaintiff was not contributorily negligent as a matter of law under the relevant Virginia cases. 5

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III. STATEMENT OF THE CASE

This case is an action for damages by plaintiff (Appellant) for injuries caused by a slip and fall in a grocery store owned and operated by defendant (Appellee). Appellant offered proof that Appellee, through its employee, negligently allowed water to accumulate on the floor and placed a packing box behind her and below her line of sight, while she was shopping in Appellee's store. Appellant also offered proof that she tripped over the negligently placed box and landed in the water. Appellee did not offer any evidence to rebut Appellant's case. Appellee moved at the conclusion of Appellant's case to strike Appellant's case. The court took that Motion under advisement and presented the matter to the jury. After the jury returned a verdict for Appellant for $60,000.00, Appellee renewed its Motion and also moved for a judgment notwithstanding the verdict. The court granted Appellee's Motions, holding that Appellant was contributorily negligent as a matter of law.

IV. ASSIGNMENTS OF ERROR

1. The Trial Court erred in granting defendant's Motion to Strike and Motion for Judgment Notwithstanding the Verdict because it appeared there was "scant evidence, if any, on the part of negligence on the part of the defendant," in that the record contains sufficient evidence upon which reasonable jurors could have relied to find that the defendant was negligent.

2. The Trial Court erred in granting defendant's Motion to Strike and Motion for Judgment Notwithstanding the Verdict because, "under the case law of Virginia, the plaintiff was contributorily negligent as a matter of law," in that, based on the evidence presented, plaintiff was not contributorily negligent as a matter of law under the relevant Virginia cases.

V. STATEMENT OF FACTS THAT RELATE TO THE ASSIGNMENTS OF ERROR

1. Plaintiff's uncontroverted evidence at trial was that she tripped over a box that was put behind her by defendant's employee as she was shopping in defendant's store. See Feb. 6, 1996, Tr. p. 91, lines 15 - 20; p. 91, line 23 through p. 92, lines 1 - 16; p. 104, line 16 through p. 105, line 5; p. 137, lines 15 -23; p. 138, lines 9 - 15; p. 141, lines 10 - 12; and p. 142, lines 14 - 23. (Note also that the words and actions of the employee as described at p. 91, lines 17 and 18; p. 92, lines 13 and 14; and p. 92, lines 9 -11, reveal that the employee admitted putting on the floor the box that Appellant tripped over. Also, his actions in quickly picking up that box imply guilty knowledge that he had created a hazard that had to be removed. The employee's words were not objected to, and thus could have properly been considered by the jury. Indeed, it is unlikely that any objection would have been sustained, since the words, in conjunction with the contemporaneous action were so clearly admissions against interest.)

2. Appellant's uncontroverted testimony was that she specifically tried to avoid Appellee's employee who was working from a cart loaded with boxes that had water on the floor coming form under the cart. She did not trip in, slip on, or land in any water until after she had tripped over a box that the employee had placed behind her while she was standing in a place that was away from where she had seen the employee working from his cart, i.e. she had specifically tried to avoid the employee who had brought the hazard to her from behind. See Feb. 6, 1996, Transcript pages and lines set out above.

VI. QUESTIONS PRESENTED

1. Was plaintiff's evidence adduced at trial (characterized by the trial court as "scant") of the negligence of defendant's employee having placed a box behind plaintiff over which she tripped, sufficient for a reasonable juror to find defendant negligent? Assignment of Error No. 1.

2. Was there such evidence of plaintiff's negligence in tripping over the box that no reasonable juror could fail to find contributory negligence, i.e. contributory negligence as a matter of law? Assignment of Error No. 2.

VII. ARGUMENT

1. The Trial Court erred in granting defendant's Motion to Strike and Motion for Judgment Notwithstanding the Verdict because it appeared there was "scant evidence, if any, of negligence on the part of the defendant," in that the

record contains sufficient evidence upon which reasonable jurors could have relied to find that the defendant was negligent. The law in Virginia is that:

> "Ordinarily, negligence is a jury issue and only when reasonable minds could not differ does the issue become one of law to be decided by a court."

See Artrip v. E.E. Berry Equipment Company, 240 Va. 354 (1990). The law in Virginia is also that, in ruling on a motion to strike plaintiff's evidence, a trial court must view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the plaintiff and any reasonable doubt as to the sufficiency of the evidence must be resolved in the plaintiff's favor. See Artrip, supra. It appears logically absurd to find that all seven people on the jury, that heard all the plaintiff's evidence, heard and applied the trial court's instructions, and found for plaintiff, were to a person, unreasonable. In addition, by describing the evidence as "scant", the court implies that a reasonable person could conclude that there was such evidence. Further, what evidence was adduced was not controverted by defendant who put on no evidence. In addition, by finding the plaintiff contributorily negligent, the court undercuts any conclusion that there was no evidence that could lead a reasonable juror to conclude that defendant as negligent. It has been held that, "contributory negligence on the part of a person injured always implies negligence upon the part of the person causing the injury." See Michie's Jurisprudence, § 25, p. 329, and the line of cases listed in footnote 14. Michie

continues, "until the negligence of the defendant has been established, there is nothing to which negligence on the part of the plaintiff can contribute. It is essential, therefore, first to establish the negligence of the defendant." See Michie's Jurisprudence, § 25, p.329 and 330, and the line of cases listed in footnote 15. By ruling that plaintiff was contributorily negligent and describing the evidence of defendant's negligence as "scant", the trial court is foreclosed from granting defendant's motions on the basis of a lack of evidence of defendant's negligence.

The evidence of defendant's negligence in this case is more than implied. Plaintiff's testimony is replete with evidence of defendant's negligence not only in her averment as to what occurred, but defendant's employee's admissions and reactions in response to her fall. See Feb. 6, 1996, Tr. references, set out in Part V., above.

2. The Trial Court erred in granting defendant's Motion to Strike and Motion for Judgment Notwithstanding the Verdict because,

> "under the case law of Virginia, the plaintiff was contributorily negligent as a matter of law,"

in that, based on the evidence presented, plaintiff was not contributorily negligent as a matter of law under the relevant Virginia cases.

The defendant's argument in its motion to strike and for judgment notwithstanding the verdict, relied exclusively on three cases, to wit,

Gottlieb v. Andrus, 200 Va. 114 (1958), Scott v. City of Lynchburg, 241 Va. 64 (1991), and Tazewell Supply v. Turner, 213 Va. 93 (1972). The fact situations in each of those cases distinguishes each from the instant case in telling and profound particulars. The facts in Gottlieb deviate so much from those of the instant case that the only similarity seems to be that both involved a fall in a grocery store. In Gottlieb, the court found that the evidence of plaintiff's inattention to her surroundings while in the store was the equivalent of walking around with her eyes closed. See Gottlieb, supra, at 118. Unlike the instant case, the Gottlieb defendant put on a defense case. Defense witnesses testified that the plaintiff did not trip over any boxes in the aisle, but, rather, simply turned an ankle. The plaintiff gave conflicting testimony at trial that made it clear she was not herself sure how she had fallen. It was clear that, even if her fall did involve some boxes, the only boxes that might possibly have been involved were in front of her, and not placed behind her while she was looking elsewhere. Also the Gottlieb plaintiff admitted that she was not paying attention to the floor where she was walking. No remotely similar defense evidence exists in the instant case. Appellant knows exactly how she fell. Her testimony was unshaken by persistent and devious cross examination. She not only said she was watching out for dangers where she was walking, but explained in detail what dangers she saw and what steps she took to avoid them, to wit, she saw the employee working from a cart of boxes, under which she saw water,

and she walked away from that hazard and never returned to it. Further, there were no defense witnesses to aver to any version of what occurred that differed from plaintiff's testimony. Not only was Mrs. D'Ambrosio's testimony uncontroverted, it was concurred with by the employee who immediately apologized for placing the box behind her, moved the box and verified her statement of events to the supervisor immediately after her fall. See Feb. 6, 1996, Tr. p. 91, lines 17 and 18; p. 92, lines 13 and 14; and p. 92, lines 9 -11.

The facts of the Scott case are also similar only in that the fall took place at a market. The Scott plaintiff fell by stepping off a curb she had known about for 60 years. See Scott, supra, at 65. It was her knowledge of the existence and location of the curb, a permanent fixture of the market, that led the Court to find that the Scott plaintiff was contributorily negligent as a matter of law. The Scott plaintiff admitted she knew of the existence and location of the curb, but just forgot. The instant plaintiff, appellant, Mrs. D'Ambrosio, could not have known about the box behind her, since it was put there while she was standing looking at vegetables and after she had passed the spot where it was placed (a logical and obvious conclusion from the evidence, since it was behind her when she turned to walk back in the direction from where she had come). Defendant offered no evidence that Appellant in the instant case knew or should have known (or even could have known) of the location of that box, the instrument of her injury, prior to her tripping over it. That box was not a

permanent fixture known to the plaintiff for 60 years as was the Scott curb. (It should be noted that in the instant case, defendant's attorney tried diligently to induce plaintiff to admit in cross examination that she did not fall over the box at all, but rather, slipped in water that she had observed earlier and then forgotten about. A careful reading of the trial transcript reveals that attempt was completely unsuccessful. Plaintiff's uncontroverted testimony was that she tripped over the box and fell into water.)

The facts of Tazewell are similarly distinguished from those of the instant case. The Tazewell evidence was that the box over which the Tazewell plaintiff tripped had been in the plain sight of both her and her sister as they walked into the store. When they later walked back out of the store the same way they came in the box was still in the same place. One sister avoided it as she had upon entering the store. The other sister, the plaintiff, had her attention distracted by some "Christmas seals". See Tazewell, supra, at 94. Thus, the Tazewell plaintiff momentarily forgot about a box she knew or should have known was in the same place as it had been when she walked into the store a few minutes earlier. She not only forgot the box was there, but also apparently stopped watching where she was going. Those telling facts are conspicuously absent in the instant case. Appellant's attention was not distracted. She simply turned to go. She did not trip over a box she had earlier seen in the same place. It had not been there earlier. A reasonable juror could (and seven unanimously did)

conclude from the uncontroverted evidence adduced by plaintiff, whether direct, implied or circumstantial, that she tripped over a box that had been taken from a cart that she had intentionally avoided, and placed behind her in the aisle, where it had not been when she walked into the store moments earlier.

The facts in the instant case are much more closely related to those in four other cases, to wit, Crocker v. WTAR Radio Corp., 194 Va. 572 (1953); Franconia Associates v. Clark, 250 Va. 444 (1995); Holland v. Shively, 243 Va. 308 (1992); and Waters v. Safeway Stores, Inc., 246 Va. 269 (1993).

In Crocker, the plaintiff's evidence was, as in the instant case, not controverted. The Crocker plaintiff, like the instant plaintiff, was an invitee to a location with which there was no evidence she was familiar. Both the Crocker and the instant plaintiffs tripped over an unanticipated deviation from her reasonable expectation of the area over which she attempted to traverse. That unexpected deviation occurred within a step or two after turning (in the instant plaintiff's case after turning around completely and going back where she had already been). The Crocker court, citing Knight v. Moore, 179 Va. 139, 18 SE2d 266, at p.270, said that:

"Unless the evidence is without conflict, or unless fair minded men cannot differ on the inferences to be drawn from it, the questions as to whether the owner of the premises has exercised the required care toward his invitee, and whether the latter has been

guilty of contributory negligence, are matters for the jury."

In the instant case the trial court clearly made her ruling based exclusively on the aforementioned Gottlieb, Scott and Tazewell cases, and she was not pleased with the outcome which she felt those cases dictated. That displeasure was revealed in her comment at the close of the trial, to wit:

"I do hope you appeal the case and I'd be more than happy if the Supreme Court told me I was wrong and this jury verdict could be reinstated." See Feb. 7, 1996, Tr. p. 45, lines 16 - 18. The above trial judge comment implies, at the very least, that she perceived some conflict, or inferences in the instant case evidence, similar to the conflict or inferences described in Crocker, quoting Knight, above. Crocker and Knight clearly hold that if such conflict or inferences are present, then the issues in a Virginia case must be decided by a jury.

The more recent Franconia case holds that where the facts, taken in the light most favorable to the plaintiff, reveal evidence of defense negligence and absence of plaintiff contributory negligence, the matter must be submitted to the jury. The court in Franconia, citing Holland v. Shively, 243 Va. 308, 415 SE2d 222 (1992); and Artrip, supra, held that:

"Normally, whether a plaintiff is guilty of contributory negligence is a jury issue unless reasonable minds could not differ. As we have stated, 'the essence of contributory negligence is carelessness and involves an objective test, i.e., whether a plaintiff failed to

act as a reasonable person would have acted for his own safety under the circumstances.'"

The instant case trial court applied no such objective test as set out in Franconia, Holland, and Artrip. The application of such an objective test to the facts of the instant case, as revealed in the trial transcripts, leads to the inescapable conclusion that a reasonable juror (as seven did) might well find from the evidence that Mrs. D'Ambrosio was not careless.

In the instant case, since the defendant did not adduce any evidence of any kind, it would also appear that a finding against the plaintiff would essentially require the trial court to reject plaintiff's testimony in its entirety. The Franconia court sets a hurdle for the defendant to get that sort of result that cannot by leaped on the evidence in the instant case. To completely disregard plaintiff's testimony would require the court as a matter of law to find that the plaintiff's testimony regarding how her injuries occurred was either "inherently incredible, contrary to human experience or to the laws of nature", citing Simpson v. Broadway-Manhattan Taxicab Corp., 203 Va. 892, 128 SE2d 306 (1962). The trial transcript in the instant case reveals no such testimony.

The Holland case involved a danger that was created by the landlord. The instant case also involves such a danger, created by defendant's employee. In the Holland case, plaintiff was aware that defendant was engaged in the very activity later discovered to have created a danger. In the Waters case, plaintiff

was aware of the ice on which she slipped and of the danger of slipping on snow or ice. It is clear from both the Holland and Waters cases that knowledge of a danger or possible danger alone does not give rise to a finding that plaintiff was contributorily negligent as a matter of law when there is evidence she was taking such precautions as were reasonable under the exigent circumstances. In the instant case plaintiff was not even aware of the specific danger (the placing of the box behind her) until after she was injured. There was ample evidence that she was taking reasonable precautions under the circumstances. See also 20 ALR 4th 517, et seq., and cases there cited.

VIII. CONCLUSION

For all of the above reasons, and others that may come forth at oral argument, Appellant/plaintiff D'Ambrosio respectfully requests this Court reverse the trial court's striking of her evidence, and granting of Appellee/defendant's motion for judgmentnotwithstanding the verdict and reinstate the jury verdict in her favor.

Respectfully submitted,

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